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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978.

NO. 78-705

IN RE NISSAN ANTITRUST LITIGATION,

P. D. Q., INC. OF MIAMI,

Petitioner,

v.

NISSAN MOTOR CORPORATION IN U.S.A. and NISSAN MOTOR COMPANY, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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P.D.Q., Inc. of Miami, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 1, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming the decision of the United States District Court for the Southern District of Florida, was reported at 577 F.2d 910, a copy of which is attached hereto in the Appendix at pp. 1a-11a. The opinion

of the United States District Court is also contained in the Appendix at pp. 12a-14a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does a manufacturer per se violate the Sherman Act when it seeks to eliminate the advertising of its products at discount prices by contractually requiring all franchised dealers to join and contribute to a cooperative advertising fund which prohibits discount advertising and which conditions each dealer's recovery of his contribution on compliance with the discounting prohibition?

STATUTES INVOLVED

The statute involved is Section 1 of the Sherman Act, 15 U.S.C. §1.

STATEMENT OF THE CASE

This is an antitrust class action instituted in July, 1972, on behalf of Datsun automobile buyers in Dade County, Florida. The action is premised on the charge that Datsun buyers paid inflated prices for their cars because the Nissan companies (Japanese manufacturer and American distributor) contracted, combined and conspired in violation of the Sherman Act to eliminate price discounting in the retail sale of Datsuns.

Various methods of effecting illegal resale price maintenance were alleged. The keystone of the scheme was to control price advertising. To that end, Nissan's franchise agreement gave it contractual control over the content of all dealer advertising.

The franchise agreement also required dealers to join a co-op advertising plan. For each new Datsun delivered to his showroom, the dealer was invoiced a co-op charge of $25-$60 per car. In order to recoup his own money from this co-op fund, as well as receive a matching contribution from Nissan, the dealer was required to advertise only at Nissan's suggested retail price or no price at all.

In addition, Nissan also prohibited any "sale" or "discount" ads. Dealers were also prohibited from advertising "giveaways" such as free air conditioning or other accessories.

Significantly, this co-op plan had already been held a per se violation by another court in Mt. Vernon Sundat, Inc. v. Nissan Motor Corp. (E.D. Va. 1975),

1976 Trade Reg. Rep (CCH) ¶60842.* At trial, petitioner pressed for a similar ruling that the co-op program was direct price fixing or tampering, constituting a per se violation of the Sherman Act. Unrebutted expert testimony was produced which confirmed what appeared obvious, that the lack of price competition in advertising has the inherent effect of stabilizing transaction prices at non-competitive levels.

Initially, the trial court indicated that it was "inclined" to view the co-op plan as a per se violation. Ultimately, however, the court opted to allow the jury to decide the legality of the co-op based on a general Sherman Act charge. Petitioner's request for a specific charge on co-op was also refused. The jury returned a verdict which found that no "combination or conspiracy" existed in violation of the Sherman Act.

The Court of Appeals affirmed, holding that, "in the absence of an agreement to fix prices," Nissan's admitted proscription and control over dealer discount advertising was "due to be appraised under the rule of reason." The court appeared to conclude that, since the jury found no "illegal combination or agreement," the co-op program could not, standing alone, be viewed a per se violation.

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* The opinion was withdrawn by stipulation two years later when Nissan settled the action.

In effect, the court ruled that a per se violation could not exist absent a "price fixing conspiracy" to control actual transaction prices. Petitioner contends that this holding conflicts with a generation of decisions by this Court and represents a radical departure from established antitrust concepts.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below conflicts with this Court's decisions in United States v. Serta Associates, Inc., 393 U.S. 534, 89 S.Ct. 870 (1969) and United States v. Sealy, Inc., 388 U.S. 350, 87 S.Ct. 1847 (1967). In both these cases, programs similar to the Nissan co-op plan were found to be per se violations of the Sherman Act. In fact, the Court of Appeals conceded in its opinion below that the decision in Serta is "strong stuff and at first blush would appear indisputably to support PDQ's contention that Nissan's cooperative advertising plan was a per se violation of the antitrust laws." Yet, the Court of Appeals finally held that a contract which admittedly precluded price discount advertising was subject to appraisal under a rule of reason standard.

2. The decision of the court below conflicts with this Court's decisions in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940) and United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377 (1927) and a host of circuit decisions based thereon.

Implicit in the decision of the court below is the erroneous assumption that only combinations which are designed to control actual sales prices fall within the per se proscription of the Sherman Act. As this Court noted in Socony-Vacuum, however, "any combination which tampers with price structures is engaged in an unlawful activity....to the extent that they raised, lowered, or stabilized prices they would be directly

interfering with the free play of market forces." 310 U.S. at 221, 60 S.Ct. at 843.

Indicating that it was "not persuaded" that the Nissan co-op plan was "price tampering" within the meaning of Socony-Vacuum or Trenton Potteries, the court below wrote:

> "Those cases dealt with agreements specifically designed to raise, lower or stabilize prices in a manner which interfered with the free play of market forces. In our case the jury found that no such combination or agreement ever existed."

Unfortunately, this approach ignores the basic thesis of petitioner's case -- that the co-op program was itself a per se violation, as well as a part of a larger overall scheme of resale price maintenance. The existence or non-existence of this larger overall scheme did not render the co-op plan any less illegal.

Moreover, it is difficult to perceive how an agreement among Nissan and its dealers which precluded discount advertising could have had any effect but to artificially stabilize prices. By definition, it prevented intra-brand competition at the advertising level. The existence of this agreement in the form of the co-op program was undisputed. To answer that "the jury found that no such combination or agreement ever existed" suggests that the jury, not the court, is the arbiter of the law.

3. The decision of the court below flatly contradicts the rationale of this Court's recent opinions in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977) and Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817 (1976).

The fundamental premise of the decisions in Bates and Virginia Pharmacy Board is the inherent nexus between price competition and advertising. As was noted in Virginia Pharmacy Board, "the only effect the advertising ban has on [the pharmacist] is to insulate him from price competition." 96 S.Ct. at 1829.

Similarly, the Bates opinion is premised on the necessary interplay between prices and advertising:

> "The ban on advertising serves to increase the difficulty of discovering the low-cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition and the incentive to price competitively is reduced...there is revealing evidence with regard to products, where consumers have the benefit of price advertising, retail prices often are drastically lower than they would be without advertising."

In contrast to this analysis, the opinion of the court below portrays the absence of competitive advertising as a factor seemingly unrelated to price structures. This approach not only defies

economic logic, it flatly contradicts the underpinning of the decisions in Bates and Virginia State Board.

4. The decision of the court below misconstrues this Court's decision in Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S.Ct. 2549 (1977) and the rule of Northern Pac. R. Co v. United States, 356 U.S. 1, 78 S.Ct. 514 (1958) and White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696 (1963). In G.T.E. Sylvania, this Court held that vertical territorial restrictions were subject to the rule of reason standard, thereby overruling to that limited extent the per se rule enunciated in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856 (1967). The G.T.E. Sylvania decision reiterated, however, the "per se illegality of price restrictions." The decision of the court below, however, unduly extends the implication of the holding in G.T.E. Sylvania to include all vertical restrictions, except "actual price-fixing agreements."

Petitioners submit that such a reading of G.T.E. Sylvania is without foundation and represents a substantial departure from established antitrust principles.

5. The decision of the court below conflicts with legal positions of the Department of Justice and long-established guidelines and policies of the Federal Trade Commission regarding enforcement of Section 5 of the Federal Trade Commission Act.

For many years, the FTC has clearly indicated that it views as illegal co-op advertising programs which restrict or inhibit dealers from discount advertising.

As recently as August 7, 1978, six days after the decision of the court below, the FTC announced the acceptance of a consent order prohibiting Advertising Checking Bureau, Inc., which administers the co-op program of over 400 manufacturers, from enforcing any of the co-op anti-discount provisions presented squarely in this case. See FTC Complaints and Orders, Trade Reg. Rep. (CCH) ¶21,450 (1978); ¶19,380 (1970) and ¶18,174 (1968).

Ironically, the genesis of this case itself was a Complaint filed by the Department of Justice against Nissan, which Complaint attacked the co-op program as a violation of the Sherman Act. Nissan itself agreed by consent judgment to terminate this very program during the course of this litigation. See 1973 Trade Cases, Trade Reg. Rep. (CCH) ¶74,333.

The decision of the court below raises serious questions about the validity of the legal position of the Department of Justice and FTC regarding these co-op programs. As a minimum, the decision below is certain to create confusion and doubt about the present state of the law in this area. Timely intervention by this Court in this case should alleviate this uncertainty in an area of vital legal and economic impact.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In re NISSAN ANTITRUST LITIGATION.

P. D. Q., INC. OF MIAMI, Plaintiff-Appellant,

v.

NISSAN MOTOR CORPORATION IN U. S. A. and Nissan Motor Company, Ltd., Defendants-Appellees.

Nos. 77-1658, 77-2572.

United States Court of Appeals, Fifth Circuit.

Aug. 1, 1978.

Local cartage company brought private antitrust class action charging that foreign automobile manufacturer and its wholly owned subsidiary had conspired or combined to fix prices in violation of federal antitrust laws. After the suit was filed, over two dozen other private antitrust actions were filed across the country and the Judicial Panel on Multidistrict Litigation, 385 F.Supp. 1253, transferred all the actions to the Southern District of Florida. Thereafter, the District Court, 61 F.R.D. 372, certified plaintiff as representative for a class of purchasers of motor vehicles. Following trial, the United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, entered judgment on a verdict that no nationwide conspiracy had existed and awarded costs. Appeals were consolidated, and the Court of Appeals, Coleman, Circuit Judge, held that: (1) the cooperative advertising program was not a per se violation of the Sherman Act and was due to be appraised under the rule of reason; (2) there was nothing unreasonable per se about anchoring advertised prices to the manufacturer's suggested retail price; (3) defendants were entitled to recover their lawful costs; (4) the district court abused discretion in awarding costs for an expedited "daily" transcript requested solely by defendants and to which plaintiff had not agreed; (5) the award of mileage costs for defense witnesses was within the district court's discretion, and (6) there was no abuse of discretion in awarding the costs of depositions used at trial and not previously used in other litigation.

Ordered in accordance with opinion.

1. Monopolies ⇐17(1.1)

In the absence of any agreement to fix prices, cooperative advertising plan pursuant to which automobile manufacturer maintained complete unilateral control as to reimbursement for dealer advertising placed in accordance with the manufacturer's criteria and which prescribed that local dealer advertisements, in order to be reimbursable, should advertise new automobiles, name the manufacturer's recommended retail price or no price at all and refrain from stating or implying that one dealer was in a better position to sell a new vehicle than any other dealer was not a per se violation of the Sherman Act and, when appraised under the rule of reason generally applicable to vertical restraints, was supported by sound business reasons. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Clayton Act, §§ 1 et seq., 4, 15 U.S.C.A. §§ 12 et seq., 15.

2. Monopolies ⇐17(1.7)

There is nothing unreasonable per se about a manufacturer's suggested retail price. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Clayton Act, §§ 1 et seq., 4, 15 U.S.C.A. §§ 12 et seq., 15.

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3. Trade Regulation ⇐870

Under federal statute, automobile manufacturer is not only authorized but also required to affix a suggested retail price sticker to each new car which is to be sold in the retail market. Automobile Information Disclosure Act, §§ 2 et seq., 4, 15 U.S.C.A. §§ 1231 et seq., 1233.

4. Monopolies ⇐17(3)

It is not illegal per se for manufacturer to require a local car dealer to contribute to the cost of advertising the product which the dealer intends to sell at a profit after he obtains it from the manufacturer. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. Federal Civil Procedure ⇐2723
Federal Courts ⇐830

Rule providing that costs shall be allowed as a matter of course to the prevailing party except when a statutory provision is to the contrary permits the district court to exercise discretion in awarding costs and, therefore, makes review by the Court of Appeals very narrow. Fed.Rules Civ.Proc. rule 54(d), 28 U.S.C.A.

6. Federal Courts ⇐830

An award of costs can be overturned only when it is shown that the district court abused discretion. Fed.Rules Civ. Proc. rule 54(d), 28 U.S.C.A.

7. Federal Courts ⇐830

Rule that an award of costs can be overturned only when a clear abuse of discretion is shown applied in private antitrust action in which plaintiff was unsuccessful in proving claim. Fed.Rules Civ.Proc. rule 54(d), 28 U.S.C.A.

8. Monopolies ⇐28(9)

Where private antitrust plaintiff was unsuccessful, defendants were entitled to recover their lawful costs. Fed. Rules Civ.Proc. rule 54(d), 28 U.S.C.A.

9. Federal Civil Procedure ⇐2740

District court abused discretion in awarding defendants costs for an expedited "daily" transcript that was requested solely by defendants and to which plaintiff had not agreed where the additional expense was for the convenience of defendants and was by no means indispensable. Fed.Rules Civ.Proc. rule 54(d), 28 U.S.C.A.

10. Monopolies ⇐28(9)

Where plaintiffs were unsuccessful in private antitrust action, it was within the district court's discretion to award mileage costs for defense witnesses. Fed.Rules Civ.Proc. rule 54(d), 28 U.S. C.A.

11. Monopolies ⇐28(9)

In unsuccessful private antitrust action, district court did not abuse discretion in awarding to defendants the cost of depositions used at trial and not previously used in other litigation. Fed. Rules Civ.Proc. rule 54(d), 28 U.S.C.A.

Appeals from the United States District Court for the Southern District of Florida.

Before TUTTLE, COLEMAN, and CLARK, Circuit Judges.

COLEMAN, Circuit Judge.

Nissan Motor Company, Ltd. (Nissan-Japan) manufactures Datsun automobiles and trucks.

It ships them to the continental United States and sells them to its totally owned subsidiary, Nissan-U. S. A. (Nissan-USA), which is responsible for the distribution and marketing of Datsuns in this Country.

Nissan-USA sells the vehicles to its franchised local dealers who, in turn, sell to their retail customers.

PDQ, Inc. of Miami (PDQ) is a local cartage company in Miami, Florida, owned by Bert Arkin, who is also its president. In late 1970, in Miami, PDQ (by Arkin) bought a Datsun sports coupe from a Datsun dealer. After a few months the coupe was sold, but its purchase was used as the springboard for this private antitrust *class* action which charged that in a nationwide conspiracy Nissan-USA and Nissan-Japan conspired or combined to fix prices in violation of the federal antitrust laws.[1] Relief was sought under § 4 of the Clayton Act, 15 U.S.C. § 15.[2] After a five week trial and five hours of deliberation the jury returned its verdict that no nationwide conspiracy had existed. In its brief to this Court, PDQ expressly declines to argue that the verdict was "against the weight of the evidence". For reversal it relies on asserted errors of law which will hereinafter be discussed.

The case comes here in the form of a consolidated appeal.

No. 77–1658 deals with errors claimed to have occurred during the trial on the issue of liability.

No. 77–2572 involves alleged error in the taxation of costs.

On the issue of liability the judgment of the trial court is affirmed. The cost award is affirmed in part and reversed in part. The case is remanded solely for modification of the order awarding costs.

The Lawsuit

PDQ describes its complaint as one which alleged that Nissan-USA "combined and conspired with its Datsun franchised dealers to eliminate or limit dealer discounting in the retail sale of new Datsuns, thereby stabilizing prices at non-competitive levels".

The defendants appraised the complaint as charging "a conspiracy between defendants and Datsun dealers across the country to sell and advertise Datsun motor vehicles at fixed prices in violation of the Sherman Act".

PDQ says that "[T]he keystone of the scheme to stifle dealer discounting was the control of dealer advertising"; that Nissan's co-operative advertising program was a *per se* violation of the Sherman Act. This *per se* argument is the only arguably plausible issue left for disposition at the appellate level.

Under the antitrust laws, the United States, in June, 1972, filed an action for injunctive relief against Nissan-USA. The action alleged a conspiracy between Nissan-USA and its dealers throughout the United States to fix prices and to restrict territories and customer selection in the sale of Datsun vehicles. This case was settled by a consent decree in February, 1973.

In July, 1972, PDQ filed this private class action in the Southern District of Florida on behalf of all non-dealer Datsun purchasers in the United States. The allegations in PDQ's complaint were

1. 15 U.S.C. § 1 provides in part:

   Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal. . . .

2. 15 U.S.C. § 15 reads as follows:

   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

substantially identical to those in the federal suit. Once PDQ filed its suit, over two dozen other private antitrust actions were filed across the country, seeking similar relief. The Judicial Panel on Multi-district Litigation transferred all actions to the Southern District of Florida. See *In Re Nissan Motor Corp. Antitrust Litigation*, Jud.Pan.Mult.Lit., 352 F.Supp. 960; 385 F.Supp. 1253.

PDQ was certified as class representative for a class of purchasers of Datsun motor vehicles. *PDQ, Inc. of Miami v. Nissan Motor Corporation in U. S. A.*, S.D.Fla., 1973, 61 F.R.D. 372. The class was certified so that the issues to be resolved were whether a nationwide conspiracy existed, and its effect, if any, upon the vehicle purchasers.

As heretofore stated, the jury, in response to special interrogatories, found that for the period in question there had been no "nationwide contract, combination, or conspiracy between Nissan-USA and its franchised Datsun dealers".

After the verdict, PDQ filed a motion for judgment notwithstanding the verdict or for a new trial. Eighteen grounds were assigned, including the contention that the trial court erred in refusing to instruct the jury that as a matter of law Nissan's cooperative advertising program was a *per se* violation of § 1 of the Sherman Act. All asserted grounds have been carefully evaluated and, except for the arguments as to the *per se* violation, are found to be so meritless as to require no discussion in this opinion.

Background

Nissan-Japan was created in 1933, but Datsuns were not marketed in the United States until 1958. In that year, Nissan-Japan hired two independent trading companies, one on each Coast, to import new vehicles into the United States. These trading companies contracted with domestic retail car agencies to distribute the vehicles. This effort met with a notable lack of success.

Several marketing problems hampered the sales of Datsuns. The American public had never heard of the car and was reluctant to buy it. The vehicles were foreign made and selling for a low price; this raised the spectre of low quality. The domestic Datsun dealers were not promoting the product. Nissan-Japan was trying to enter a well established market, controlled primarily by domestic car manufacturers. Of a total of 6,500,000 new motor vehicles domestically sold in 1960, only 1,300 were Datsuns.

In an effort to cope with this situation, in September, 1960, Nissan-Japan created Nissan-U.S.A. as its wholly-owned subsidiary in charge of distribution and marketing of Datsuns in the United States. It replaced the trade companies formerly in charge of distribution and marketing.

Nissan-U.S.A.'s primary goal was to establish a strong network of retail dealers who not only would promote Datsuns but would also provide mechanical services and parts to Datsun customers. It knew that to start and maintain such a dealer network the dealerships had to be profitable. Nissan-USA could not afford a reputation for dealers going broke; buyers would have no confidence in purchasing a car on which they could not obtain service. Nissan-USA began hiring American auto industry executives who would carry out the marketing plans. These executives established a system for distributing the Datsun automobiles. A person is designated as a "franchise dealer" by Nissan-USA after

a Datsun Dealer Sales and Service Agreement (franchise contract) is entered into by both parties. In this contract, Nissan-USA agrees to sell Datsuns to the dealers, provide expert advice in service areas, and promote the vehicles nationally. The dealer, separately from and financially independent of Nissan-USA, agrees to buy Datsuns from it, promote the vehicles locally, provide parts and mechanical service facilities, and sell the vehicles. A dealer hires his own personnel and is responsible for providing capital for a showroom, parts, inventory, and other expenses. While Nissan-USA has a legitimate concern with local operations, the local dealer is ultimately responsible for his own success or failure.

To help the local dealers with problems which may arise, Nissan-USA employs district managers to advise dealers. These managers also act as selling agents, keeping the local dealers supplied with new vehicles. During the early years of United States marketing and during the time with which this case is concerned, the district managers would advise the local dealer on promotion, advertising, and selling the new vehicles.

The Alleged Per Se Violation

We now evaluate the operations of the cooperative advertising program which existed between Nissan-USA and its franchised dealers—a program which PDQ insists was a *per se* violation of the antitrust law.

In the franchise contract, the individual local dealer agreed to belong to an advertising cooperative operated by Nissan-USA. The pertinent part of the franchise contract reads:

> D. In order to give Dealer the advantage of comprehensive and coordinated dealer advertising consistent with Seller's National advertising program, *a cooperative advertising fund may be established* by Seller. Such fund shall *consist of an amount charged Dealer by Seller for each vehicle sold to Dealer and a like amount contributed by Seller. The amount charged to Dealer and contributed by Seller shall be established by Seller*, and may be changed from time to time. Such fund shall be used for advertising or promoting Datsun products in the area wherein Dealer maintains its place of business, by advertisements placed by Seller and/or Dealer and/or, where such groups exist, by or on behalf of dealer's cooperative advertising groups. *All payments from such fund shall be for expenditures for advertising or promotions approved by Seller* and shall be made only upon receipt by Seller of proof of the expenditure. *Dealer shall have no rights with regard to monies in such fund, except the right to have them expended in accordance herewith.* (Emphasis added.) (Plaintiff Exhibit No. 3025.)

The evidence showed that in actual execution this contract operated in the following manner. When the dealer bought a new car from Nissan-USA, he was charged from $25 to $60 as part of the price for the car and this sum went into the co-operative advertising fund, over which Nissan-USA maintained complete *unilateral* control as to reimbursements for dealer advertising placed in accordance with Nissan criteria. Periodically, "advertising standards" were mailed to the dealers outlining the required criteria. A typical example of such a mailing (September 1, 1970) is appended to this opinion.

To be reimbursable under the co-operative advertising plan it was prescribed that the local dealer advertisement should (1) advertise *new* Datsuns, (2) name the manufacturer's recommended retail price or no price at all, and (3) could not state or imply that one dealer was in a better position to sell a new vehicle than any other dealer. If the dealer complied with the prescribed standards he was reimbursed to the extent of his contributions, plus a matching amount from Nissan-USA.

There was evidence, however, that regardless of the requirements for participation in the advertising fund dealers actually sold the vehicles at whatever price they chose. Moreover, they were free to advertise new cars at whatever price they wished so long as done at their expense, without refund and matching money from Nissan-USA. On his own volition, at his individual expense, the local dealer could advertise "sales" and advertise used cars as he saw fit.

The Law

PDQ insisted that there were three basic elements to the allegedly unlawful combination or conspiracy: (1) the co-operative advertising program, (2) the system of district managers which forced the local dealers into selling new cars at higher prices, and (3) a third ground which has since been rejected by the Supreme Court. We think Contention No. 2 evaporated with the jury verdict and that only Contention No. 1 remains for resolution, the outcome depending on whether No. 1 was a *per se* violation of the applicable law.

PDQ says that a *per se* violation was established under teachings of *United States v. Serta Associates, Inc.*, 296 F.Supp. 1121 (N.D.Ill., 1968), *affirmed* in, 393 U.S. 534, 89 S.Ct. 870, 21 L.Ed.2d 753 (1969), and *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967).

Sealy arrived at the Supreme Court before *Serta*. Sealy "was engaged in a continuing conspiracy with its manufacturer-licensees to agree upon and fix minimum retail prices on Sealy products and to police the prices so fixed", 388 U.S. at 351, 87 S.Ct. at 1849. Since 1925, and continuously thereafter, "the prices to be charged by retailers . . . have been fixed", 388 U.S. at 355, 87 S.Ct. at 1851. The anticompetitive nature and effect of the activities were so apparent and so serious that "the courts [would] not pause to assess them in light of the rule of reason", 388 U.S. at 355, 87 S.Ct. at 1851.

It is to be noted, however, that *Sealy* was a "*horizontal agreement*" case, *i. e.*, one in which the participants "in the normal course of things would be competing among themselves", 388 U.S. at 352, 359, 87 S.Ct. at 1853. On the other hand, "vertical restraints" are those limitations imposed by a manufacturer on his own dealers, or by a licensor on his licensees, which may have independent and valid business justifications (dissenting opinion of Mr. Justice Harlan, 388 U.S. at 359, 87 S.Ct. 1847).

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58, 59, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) was a private antitrust action concerned with vertically imposed restraints on locations for franchised local retailers. Expressly overruling a prior decision, the Supreme Court did not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition but it did "make clear that departure from the rule of reason standard [in vertical restraint cases] must be based upon de-

monstrable economic effect", 97 S.Ct. at 2562. The Court returned to the rule of reason that had governed vertical restrictions prior to *United States v. Arnold, Schwinn & Company*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), saying that "[w]hen competitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason . . .", 97 S.Ct. at 2562, 2563.

We now return to *United States v. Serta Associates, Inc., supra*, "a contemporary companion case to *Sealy*". *Sealy* and *Serta* presented "virtually the same facts" and both were "essentially horizontal combinations", 296 F.Supp. at 1122. Indeed, the decision at the trial level in *Serta* had been deferred pending the decision of the Supreme Court in *Sealy*.

Keeping our eyes on the fact that *Serta* was a matter of horizontal restrictions, Serta's co-operative advertising plan was described as follows:

> In addition, Serta and its licensees influenced the retailers' advertised prices by offering cooperative advertising programs, whereby advertising mats, sales material, and a portion of the cost were supplied by Serta; however, a dealer was not allowed to participate in the program unless all of his advertisements contained Serta's suggested retail prices. When combined with the surveillance of all advertising, this practice hampered dealers who wanted to sell below the advertised price because they had only three options; they could advertise Serta standard items at the prices contained in the specifications, advertise without using a price, or refrain from any advertising.
>
> 296 F.Supp. at 1125.

Citing *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), and *United States v. Trenton Potteries Company*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927), the District Court held that "interference with local advertising violates the strict *per se* prohibition of all tampering with price" and that "all attempts to influence the locally advertised prices of the dealers are illegal, including price restrictions in Serta's cooperative payment program", 296 F.Supp. at 1126.

Since it had already decided *Sealy*, the Supreme Court affirmed *Serta* on motion of the government, without written opinion.

The quoted language from the District Court opinion in *Serta* is "strong stuff" and at first blush would appear indisputably to support PDQ's contention that Nissan's cooperative advertising plan was a *per se* violation of the antitrust laws. Upon analysis, however, we are of the view that *Serta* had decisive distinguishing characteristics.

1. The *Serta* and *Sealy* defendants, acting horizontally instead of vertically, had so apparently and so seriously fixed the prices to be charged by retailers, of such an anti-competitive nature and effect, that the Court would not pause to assess them in the light of reason.

2. The co-operative advertising program was one of the methods designed to implement the illegal agreement.

3. Here, in a vertical restraint case, the jury found that no nationwide combination or agreement existed. This finding had such sufficient evidentiary support that appellant now declines to attack it. The evidence shows that the Datsun dealers were free to sell cars, and did sell them, at their prices.

[1] Looking at the provisions of the co-operative advertising plan, imposed by the manufacturer upon all of its franchisees, we cannot say as a matter of law that the plan, in the absence of an agreement to fix prices, was on its face of such an anticompetitive nature and effect that it negated the rule generally applied in the appraisal of vertical restraint cases.

In the franchise agreement, Nissan-USA agreed to promote Datsun automobiles nationally. The franchise dealers bound themselves to promote the automobiles locally. There could be sound business reasons for specific advertising requirements, especially where Nissan not only returned the franchisee's advertising investment but matched it with its own funds.

[2] Neither can we perceive anything unreasonable *per se* about anchoring advertised prices to the manufacturer's suggested retail price. After all, there is nothing unreasonable *per se* about a manufacturer's suggested retail price.

[3] By federal statute, the manufacturer is not only authorized, but required, to affix a suggested retail price sticker to each new car which is to be sold in the retail market, 15 U.S.C., § 1231, *et seq.* (The Monroney Act). Indeed, it is a misdemeanor to withhold, alter or remove such a sticker, 15 U.S.C., § 1233. PDQ suggests that the only function of a suggested retail price is to provide the basis for bargaining, but we fail to see how the same could not be said of an advertisement which states that same suggested window sticker price.

[4] Neither are we able to say as a matter of law that it is illegal *per se* to require a local car dealer to contribute to the cost of advertising the product which he intends to sell at a profit after he obtains it from the manufacturer who is vitally interested in the continued prestige, acceptability, and marketability of that product.

We would have a different *per se* case if the manufacturer had fixed a price which the retailer had to follow in actual sales and if the retailer were compelled to contribute to the advertisement of such a fixed price.

Since this is not that kind of case, we hold that the Nissan co-operative advertising program was not a *per se* violation of the Sherman Act and was due to be appraised under the rule of reason.

We are not persuaded by the idea that the advertising plan here at issue was "price tampering" within the meaning of *Socony-Vacuum, supra*, or *Trenton Potteries, supra*. Those cases dealt with agreements specifically designed to raise, lower, or stabilize prices in a manner which interfered with the free play of market forces. In our case the jury found that no such combination or agreement had ever existed.

Conclusion

This antitrust case, in all its disputed facets, was of a kind particularly suited to the disposition of a jury upon competent evidence after being properly instructed.[3] We do not prolong a lengthy

3. The District Court instructed the jury, in depth, with what appears to have been great care. Obviously, we cannot quote all of the instructions in this opinion. For clarity, however, we do quote the following (appearing at Pages 124–128 of the printed Appendix).

> "A price-fixing conspiracy may constitute any mutual agreement or arrangement or understanding between two or more persons to sell at a uniform price or to raise or lower or to stabilize prices. Thus, a common plan or understanding knowingly made or arranged or

opinion to detail, point by point, the complaints of PDQ about evidentiary rulings and jury instructions. Those complaints did have our incisive consideration and are found to be without reversible merit.

The judgment of the District Court on the issue of liability is

AFFIRMED.

Award of Costs

After entry of final judgment by the trial court, the defendants filed a Bill of Costs totalling $42,452.16. Upon reviewing the Bill and after a full briefing, the Court entered an Order Reviewing Bill of Costs in which it awarded the defendants costs totalling $34,272.80. These costs were comprised of $16,920 for trial transcripts, $15,739.80 for deposition costs, $1,608.60 for witness fees, and $4.40 for Marshall fees. In this appeal No. 77-2572, PDQ urges that the taxing of costs was improper.

[5-8] Rule 54(d) of the Federal Rules of Civil Procedure states that costs shall be allowed as a matter of course to the prevailing party except when a statutory provision is to the contrary. This rule permits the district court to exercise its discretion in awarding costs and, therefore, makes our review very narrow. *See LeLaurin v. Frost National Bank*, 5 Cir., 391 F.2d 687, 692, *cert. denied*, 393 U.S. 979, 89 S.Ct. 447, 21 L.Ed.2d 440 (1968). Only when a clear abuse of discretion is shown can an award of cost be overturned. *Kinnear-Weed Corp. v. Humble Oil and Refining Co.*, 5 Cir., 441 F.2d 631, 637, *cert. denied*, 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971). This rule applies in this antitrust action in which the plaintiff was unsuccessful in proving his claim. *See Lewis v. Pennington*, 6 Cir., 400 F.2d 806, 819, *cert. denied*, 393 U.S. 983, 89 S.Ct. 450, 21 L.Ed.2d 444 (1968). The defendants were entitled to recover their lawful costs.

[9] As an individual portion of the costs, the trial court awarded costs for an expedited "daily" transcript requested solely by the defendants and to which the plaintiffs had not agreed. This additional expense was for the convenience of the defendants and was, by no means, indispensable. Therefore, this award was an abuse of discretion. *See Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 233-34, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964); *United States v. Lynd*, 5 Cir. 1964, 334 F.2d 13; *Hiller v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 60 F.R.D. 87, 89 (N.D.Ga.1973). Upon remand the award for the cost of the daily transcripts must be deleted.

[10, 11] The award of mileage costs for defense witnesses was properly within the trial court's discretion. *Farmer v. Arabian American Oil Co., supra.* There was also no abuse of discretion in awarding the cost of those depositions used at trial and not previously used in other litigation. *Harrington v. Texaco, Inc.*, 5 Cir. 1964, 339 F.2d 814, 822, *cert. denied*, 381 U.S. 915, 85 S.Ct. 1538, 14 L.Ed.2d 435 (1965).

Except for the daily transcripts, the award of costs is affirmed. The case is remanded for modification of the order awarding costs.

No. 77-1658 AFFIRMED.

No. 77-2572 AFFIRMED, as modified, and REMANDED.

entered into between two or more sellers engaged in interstate trade or commerce who adopt or follow or adhere to any pricing formula which will result in raising or lowering or maintaining at fixed levels prices charged for goods or services sold in interstate trade or commerce would constitute a price-fixing conspiracy in violation of the federal anti-trust laws.

"A contract, combination, or conspiracy which has the effect of fixing, maintaining or stabilizing resale prices constitutes a violation of the antitrust laws and is an unreasonable restraint of interstate or foreign commerce as a matter of law. Whether the prices agreed to be fixed, maintained or stabilized, are reasonable or unreasonable is not material.

"Therefore, if you find that there was a contract, combination or conspiracy which had the effect of fixing, maintaining, or stabilizing resale prices then you must find that the participants in the contract, combination, or conspiracy violated the law.

"You are instructed that defendant Nissan-USA had the right to enter into various agreements with its franchised Datsun dealers. It is, of course, common for one business enterprise to enter into many oral and written agreements with another business enterprise during the regular and ordinary conduct of its business. Not all agreements violate the antitrust law. The only type of agreement with which you are to be concerned is the agreements alleged by plaintiffs to be unlawful under the antitrust laws—that is, anticompetitive agreements between defendants and all Datsun dealers to sell and advertise only at fixed prices, to establish exclusive territories, and to refrain from selling Datsuns to particular classes of customers."

APPENDIX

Letter sent to all Datsun dealers on September 1, 1970.

"We have been asked by many dealers for a statement of our policies in judging advertising submitted for co-op reimbursement. We do not like to refuse reimbursement and we are positive that dealers don't like it either. With growing interest in retail advertising by state and federal agencies, we feel that all Datsun dealers will benefit from uniform advertising standards.

"Generally, we recommend that all Datsun dealers follow the standards of practice in the booklet prepared by the National Automobile Dealer's Association and the Better Business Bureau. We urge you to keep this booklet with your Datsun advertising file and refer to it from time to time.

"Along with the general industry standards of advertising practice, following are points we check before a Datsun ad is approved for co-op reimbursement.

1. All advertising should be exclusively Datsun. No co-op will be paid on ads combining Datsun with other makes.

2. All Datsun advertising should be exclusively on new cars.

3. If price is used, it must be not lower than Datsun suggested retail price, plus any additional costs (D & H, freight, etc.) required by local or state regulations.

4. If price and car are used together, the price must be for the car featured. For example, do not use an illustration of a 240-Z with price saying "Datsun prices start at $1,916.00".

5. If monthly payments are included in an ad, specify down payment, monthly payments, length of contract, and all other information required by the federal "truth in lending" law.

6. Any guarantee other than regular Datsun warranty should be clearly identified.

7. All ads including information about financing should state qualification requirements, for example, "5½% bank financing . . . (to qualified purchaser or with approved credit)".

8. We will not approve co-op for any Datsun "sale" ads which infer that dealer is selling for less than suggested prices.

9. No co-op will be paid for ads which include copy about "overstocked, huge inventory, volume

dealer" or any such copy that might infer that one dealer is in a better position to make a good deal than another.

10. No co-op will be paid for any ads offering "free" or "bonus" items with purchase of a new Datsun which, in effect, discounts the price of the unit.

"If you have any questions about co-op advertising reimbursement, please check with your district or regional manager. The time to check is before the ad is written."

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul. Minn.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MDL DOCKET NO. 120

IN RE:

NISSAN MOTOR CORPORATION
ANTITRUST LITIGATION

P.D.Q., INC. OF MIAMI	:	
Plaintiff	:	
v.	:	CASE NO. 72-1159-Civ-CA
NISSAN MOTOR CORPORATION IN U.S.A. & NISSAN MOTOR COMPANY, LTD.	:	
Defendant	:	

ORDER DENYING MOTION FOR NEW TRIAL AND J.N.O.V.

THIS CAUSE is before the Court upon plaintiff's motion for judgment notwithstanding the verdict or in the alternative, a new trial. Upon careful consideration of the briefs submitted by counsel and a review of the record, the Court finds that plaintiff's motion should be denied.

In considering a motion for judgment notwithstanding the verdict, the following standard must be applied:

"If the facts and inferences point so strongly and overwhelmingly in favor of one party, that the Court believes

that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied." Boeing Company v. Shipman, 411 F.2d 365, 374 (5th Cir., 1969).

A review of the record shows that the evidence was of such a quality and weight that reasonable and fair-minded men might reach different conclusions. It cannot be said that the jury's finding that there was not a nationwide contract, combination, or conspiracy was unreasonable in light of the evidence. For example, the plaintiff introduced only one franchise agreement into evidence. One franchise agreement between two parties does not amount to a nationwide contract. In Response of Carolina, Inc. v. Leasco Response, Inc., _____F.2d____(5th Cir., 1976); 1976 - 2 Trade Cases ¶61,045, unlike here, there were only two parties involved, so that the introduction into evidence of the sole contract satisfied the jurisdictional requirement.

The plaintiff's motion for judgment n.o.v. is DENIED.

The general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair. Additionally, a prejudicial error of law is a ground for a new trial. Wright & Miller, Federal Practice & Procedure: Civil §2805 (1973).

The Court finds that the verdict is not contrary to the weight of the evidence. Furthermore, no prejudicial errors were committed that in justice would require a new trial.

It is unnecessary to address each point raised by the plaintiff's brief, but the following comment might clarify the record.

The failure of the Court to submit the plaintiff's proposed special verdict regarding the TOKYO-USA wholesale price conspiracy was not error. The plaintiff made no objection regarding the wholesale price conspiracy at the charge conference. [T.-31, pp 5218-22, 5236-37]. The plaintiff may have therefore, waived its objection. First Nat. Bank, Henrietta v. Small Business Admin., 429 F. 2d 280 (5th Cir. 1970).

Moreover, the TOKYO-USA wholesale price conspiracy was unsupported by the evidence so that its submission to the jury would have been improper. See, Hart v. Mazda Motors of America, 521 F.2d 193 (5th Cir. 1975).

Accordingly, plaintiff's motion for a new trial is DENIED.

DONE AND ORDERED at Miami, Florida, this 15th day of February, 1977.

s/C. Clyde Atkins
United States District Judge

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Writ of Certiorari was served on counsel for respondents by depositing a copy thereof in the U. S. mails at Philadelphia, postage prepaid, on Friday, October 27, 1978 and addressed as follows:

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

NO. 78-705

P. D. Q., INC. OF MIAMI,

Petitioner,

v.

NISSAN MOTOR CORPORATION IN U.S.A. and NISSAN MOTOR COMPANY, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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P. D. Q., INC. OF MIAMI,

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v.

NISSAN MOTOR CORPORATION IN U.S.A. and NISSAN MOTOR COMPANY, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

QUESTION PRESENTED

The question purportedly presented by petitioner is not presented on this record. Under proper instructions which present no novel or conflicting questions of law, the jury found that none of the alleged contracts, combinations or conspiracies existed. The jury so found upon ample evidence that respondents did not seek to eliminate discount advertising and did not in fact do so, that dealers were not prohibited from discount advertising but freely used discount ads, and that reimbursement of dealers for their advertising was not in fact conditioned on compliance with

any discounting prohibition. In the Court below, petitioner expressly declined to contest the sufficiency of the evidence supporting the jury verdict.

No substantial question is presented for review by this Court.

STATUTES INVOLVED

15 U.S.C. § 1 (The Sherman Act) and 15 U.S.C. § 1231 *et. seq.* (The Monroney Act).

STATEMENT OF THE CASE

This is an appeal from the affirmance by the Court of Appeals for the Fifth Circuit of a judgment entered on a jury verdict in favor of the respondents following a five week trial before Judge C. Clyde Atkins of the Southern District of Florida. *See* 577 F.2d 910 (5th Cir. 1978).

Petitioner's complaint charged a nationwide conspiracy between respondents and Datsun dealers to sell and advertise Datsun motor vehicles at prices fixed by respondents, to restrict territories and to prohibit sales through discount houses. (Petition Appendix 3a-4a, hereinafter "Pet. App.") At trial, petitioner maintained that respondents had engaged in an agglomeration of illegal restraints and methods of achieving illegal resale price maintenance. The evidence introduced at trial included thousands of pages of documentary exhibits submitted by both sides and the testimony of more than 85 Datsun dealers and other witnesses. The trial record comprised more than 5,600 pages of transcript.

Under the instructions, had the jury found the facts concerning the cooperative advertising program to be as asserted in the petition, they could readily have found the conspiracy charged. The jury found there was no such conspiracy. On appeal in the Court below, the petitioner expressly declined to argue that the verdict was "against the weight of the evidence" (Pet. App. 3a), thus conceding for these appeals that the evidence supports the verdict. Instead, petitioner chose to assert more than a dozen claimed errors of law, only one of which it still maintains here.

ARGUMENT

The Court of Appeals held that a "cooperative advertising program" formerly used by Nissan-USA and franchised Datsun dealers should be evaluated by the "rule of reason" and that, so evaluated, the program was lawful. In point II of this Argument respondents will demonstrate that the Court of Appeals' decision was both correct and consistent with prior authorities.

In passing on the Petition for Certiorari, however, a crucial threshold point is that the petition raises an abstract legal question which does not present a controversy appropriate for decision by this Court. The jury in this case did in fact evaluate the "co-op program" according to the *per se* standard which petitioner claims is applicable. Consequently, the issue of law petitioner purports to raise is not truly presented. Instead, petitioners are in effect asking this Court to reach an abstract legal question based on an inaccurate description of the co-op program in the petition. The facts which petitioner asserts constitute the co-op program were in dispute at trial. In reaching its verdict, the jury necessarily rejected petitioner's version of the facts. The jury did so upon substantial evidence and petitioner expressly elected not to challenge on appeal the sufficiency of the evidence to support the jury's verdict. (Pet. App. 3a) Consequently, as is demonstrated in point I, even if petitioner had raised an issue of law worthy of consideration by this Court, that legal issue is not posed and ripe for adjudication on the facts of this case and cannot be reached by the Court.

I. Petitioner's "Question Presented" Is Not Posed On The Record In This Case.

A. Petitioner's "Question Presented" Assumes Facts Which Were In Dispute In The Trial Court And Decided Against Petitioner By The Jury.

Petitioner's effort to secure Supreme Court review of the Court of Appeals' decision is premised upon an inaccurate description of a cooperative advertising program formerly used by Nissan-USA and franchised Datsun dealers. (Pet. at 3) The legality of the program cannot be considered without first determining what the program was. Such a determination was a factual issue at trial which the jury was required to consider before reaching its verdict.

The evidence before the jury established that the co-op program was a vehicle for providing financial assistance for advertising efforts of local Datsun dealers, especially in the area of television advertising normally beyond the means of individual dealers. (PX-3025; Tr. 2616, 3409) Under the program, each Datsun dealer had a co-op "account". A dealer's contribution to that account was collected as a per-vehicle charge which appeared on the Nissan-USA invoice to the dealer when he purchased a Datsun for resale. Nissan-USA then made a matching contribution to the account. Thereafter, the funds in a dealer's co-op account were used to reimburse him for advertising. (Tr. 3205, 3572)

The Petition's description of the co-op program (Pet. at 3) is based upon a few Nissan-USA bulletins which stated that dealer advertising using prices other than the suggested list price required by the federal Monroney Act, 15 U.S.C. § 1231 *et. seq.*, was not eligible for reimbursement out of

co-op funds. However, even these particular bulletins did not prohibit discount advertising. In the contemporaneous words of Nissan-USA's National Advertising Manager, "none of our advertising rules and regulations says that we insist that a dealer advertises for such and such a price." (DX-3472) Moreover, dealers were completely free to do any kind of advertising they desired with their own funds. Virtually all dealers did advertising over and above their co-op accounts, and for many dealers the co-op fund represented only a fraction of their advertising budgets.[1]

Moreover, the evidence before the jury showed that the co-op program was explicitly not intended to control or relate to a dealer's actual selling price. For example, a Nissan-USA bulletin to dealers explaining the program stated flatly that "[w]e cannot nor are we attempting to establish your retail selling price. . . ." (DX-5474, p. 3)

The distribution of the particular Nissan-USA bulletins relied upon by petitioner, and the actual terms of the entire co-op reimbursement program, were disputed factual issues at trial. Fifty-four Datsun dealers from all across the country testified at trial in person or by deposition, and petitioner *stipulated* that thirty-one other specifically identified Datsun dealers would have given the same testimony had they been called as witnesses. (Tr. 4781-86) Many of these dealers did not receive or could not recall receiving the bulletins relied upon by petitioner, and were never aware of any pricing restrictions on co-op reimbursement.[2]

Moreover, the evidence the jury considered showed that the co-op program as actually implemented did not in fact

[1] Tr. 1019; 2452; 2552-53; 2739; 2834; 2839-40; 2952-53; 3194; 3458; 3489; 3531-32; 3869; 3938. *See also* Tr. 2789; 3058; 3128-29; 3348; 3412-13; 3725; 3765-66; 3793; 3844; 4353-54; 4406; 4432.

[2] Tr. 2684-87; 3499-3500; 3592-93; 3598-99; 3776; 3841-42.

condition recovery of a dealer's co-op contribution on compliance with any discount advertising prohibitions, as petitioner suggests. (Pet. at 2) Datsun dealers frequently received co-op reimbursement for discount, sale, and giveaway ads.[3] From 1967 to 1972, the dollar amount of reimbursement refused dealers for reasons challenged by petitioner represented only 0.1% of dealers' contributions to co-op funds.[4]

Although petitioner now claims that the cooperative advertising program was a key element of an alleged "scheme . . . to control price advertising" (Pet. at 3), the trial record considered by the jury disproves this claim. During the trial, the Datsun dealer witnesses, as well as respondents' witnesses, unanimously denied that Nissan-USA entered into agreements with dealers concerning or restricting the content of their advertising or, in particular, concerning whether or not they would advertise price discounts. Nor did Nissan-USA pressure or threaten dealers to influence their advertising's content, or to prevent or inhibit discount ads.[5] Quite the contrary, the dealers testified that they themselves determined the content of their advertising, and whether or not they advertised price discounts, on the basis of their own independent business judgment.[6] Many

[3] Tr. 2734 and 2739-40; 3413; 3589; and 858-59; 869-70; 2739-40; 2836; 3632-33; 3765-66; 3832; 4024-27; 4106-07.

[4] Calculated from Tr. 2237-38, DX-5474, PX-1000b.

[5] Tr. 4834; 4606; 2452; 2551, 2601; 2738; 2949; 3953; 3193; 3348-49; 3412; 3572; 3722, 3724, 3728; 3935-36; 4023; 4170-71; 4404. *See also* 1107-08; 2786-87, 2794-95; 2832; 3037, 3039; 3059, 3061; 3121, 3126-27; 3258-59; 3307, 3309; 3445; 3466; 3484; 3501; 2628, 3627; 3648; 3681; 3795; 3835-36; 3902-03; 3987-88; 4101, 4103-04; 4127-28; 4239, 4254; 4356; 4703-04; 4732-33; 4749-50.

[6] Tr. 2448; 2551; 2738; 3412; 3725; 3935; 4023; 4169; 4401, 4405. *See also* 916; 2676; 3445; 3486.

dealers did in fact advertise price discounts, and others did not, for their own independent reasons.[7]

In short, the purpose, terms, and effect of the cooperative advertising program, which petitioner has asserted as the foundation for its argument here, were all disputed factual issues at trial. Respondents introduced substantial evidence proving that the co-op program's purpose, terms, and effect were not anticompetitive and were quite different from what petitioner has claimed to this Court. The District Court therefore properly submitted to the jury the factual question of whether the co-op program constituted a contract, combination, or conspiracy of the type which the Court instructed would violate the Sherman Act, 15 U.S.C. § 1.

B. The Jury Evaluated The Co-op Program According To The *Per Se* Standard Which Petitioner Claims Is Applicable.

In view of what the petitioner has portrayed as the legal issue presented by this case, it is critical to note that the jury was instructed to evaluate the lawfulness of the co-op program under the *per se* rule which petitioner claims is applicable. Thus, the jury was asked by a special verdict to determine whether or not there existed a "contract, combination or conspiracy between Nissan-USA and its franchised Datsun dealers. . . ." (Special Verdict No. 1) In answering this special verdict, the jury was instructed to concern itself with "the agreements alleged by plaintiffs to be unlawful under the antitrust laws—that is, anticompetitive agreements between defendants and all Datsun dealers to sell and advertise only at fixed prices, to establish exclusive territories, and to refrain from selling Datsuns to particular classes of customers." (Tr. 5579)

[7] Tr. 992; 2441-48; 2537-43; 2667, 2672; 2734-38; 2830-31; 2943-52; 3097; 3191-94; 3411-12; 3446-47, 3457; 3565, 3571; 3632; 3722-23; 3765-66; 3791-93; 3870; 4022-24; 4095; 4169-71, 4186; 4354, 4359; 4403-05.

Even more particularly, the District Court instructed the jury that petitioner alleged an "unlawful combination and/or conspiracy", the terms of which included that "Nissan USA extracted adherence from the Datsun dealers to a business practice or policy of not advertising below manufacturer's suggested retail prices or advertising which inferred price discounting." (Tr. 5566-67)

In explaining to the jury what constituted an unlawful contract, combination or conspiracy requiring an affirmative answer to Special Verdict No. 1, the District Court unequivocally charged that *any* contract, combination or conspiracy either for the purpose or with the effect of raising, lowering, or stabilizing prices was unlawful. In particular, the jury was instructed that the antitrust laws were violated by:

> (1) "*any* mutual agreement or arrangement or understanding between two or more persons to sell at a uniform price or to raise or lower or to stabilize prices," or
>
> (2) any "*contract,* combination or conspiracy *which has the effect* of fixing, maintaining or stabilizing resale prices. . . ." (Tr. 5576-77) (emphasis added)

Therefore, the final charge was a classic statement of the *per se* rule. The charge did not set forth the "rule of reason" or explain any of its elements.[8] Indeed, the final jury instructions fully embraced the petitioner's argument (Pet. at 6-7), drawn from *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), that to the extent any activities "raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces" and thus unlawful. *Id.* at 221.

[8] Indeed, the jury was told that reasonableness or unreasonableness was immaterial. (Tr. 5577)

As petitioner's counsel strenuously argued to the jury in closing arguments (*see, e.g.*, Tr. 5266-67, 5270, 5276-77), under the final instructions the jury could not answer "No" to Special Verdict No. 1, as it did, without first concluding that the co-op program never had any purpose or effect of raising, lowering, maintaining, or stabilizing prices. As shown above, the jury verdict was supported by substantial evidence—in fact, so very substantial that petitioner expressly disavowed any effort to challenge the sufficiency of the evidence before the Court of Appeals. (Pet. App. 3a)

In sum, petitioner does not have any meritorious complaint about the legal standards which were applied at the trial. Under final instructions which fully expressed the legal position advocated in the petition, the jury concluded that the co-op program did not constitute a contract, combination or conspiracy of the type which, it was clearly instructed, violated the antitrust laws.

II. The Court of Appeals Decision Correctly Applies All Relevant Supreme Court Decisions and Is Not In Conflict With Any Decision Of Another Circuit Court.

Before the Court of Appeals, petitioner argued that the District Court should have in essence directed a verdict against respondents on the cooperative advertising issue by instructing "that as a matter of law Nissan's cooperative advertising program was a *per se* violation of § 1 of the Sherman Act." (Pet. App. at 4a) In rejecting this argument, the Court of Appeals did not simply rely on the many factual issues concerning the purpose, terms, and effect of the program which precluded such a preemptory instruction. Instead, the Court of Appeals decided the case on broader grounds by first assuming for the purpose of its decision the particular view of the co-op evidence advocated by petitioner and rejected by the jury. (Pet. App. 5a-6a) The Court, after assuming the petitioner's characterization of the evidence, concluded that the Nissan cooperative advertising program was not as a matter of law a violation of § 1 of the Sherman Act. (Pet. App. 8a) In so holding, the Court of Appeals was correct and entirely consistent with prior authorities.

None of the Supreme Court cases cited by petitioner is in any way inconsistent with the Court of Appeals decision. *United States* v. *Serta Associates, Inc.*, 296 F.Supp. 1121 (N.D. Ill. 1968), *affirmed per curiam without opinion*, 393 U.S. 534 (1969), the case upon which petitioner places its greatest reliance (Pet. at 6), involved factual findings of a horizontal conspiracy to fix actual prices as well as all advertised prices. 296 F.Supp. at 1122-23, 1125-26. In contrast, the present case involves an alleged vertical conspiracy and a factual finding by a jury that no conspiracy ever existed. (Pet. App. 3a, 7a-8a)

Although the District Court in *Serta* did review a particular cooperative advertising arrangement, the *Serta* arrangement was significantly different from the Nissan program in two crucial respects. First, a dealer in *Serta* was "not allowed to participate in the program unless *all* of his advertisements contained Serta's suggested retail prices." 296 F.Supp. at 1125 (emphasis supplied). In the present case, however, there was not even arguably any restraint on dealer discount advertising not within the scope of the pro-

gram. Second, the *Serta* prohibition on discount advertising was enforced by the outright termination of offending dealers and threats of such termination. 296 F.Supp. at 1123-24 & n. 3. Again, however, petitioner does not claim to this Court, and did not claim to the Court of Appeals, that there were any terminations, or threats of termination, of Datsun dealers for advertising below the federally-mandated Monroney sticker price.

It could not possibly be said of the Nissan program, as was determinative of the advertising issue in *Serta,* that "[w]hen combined with the surveillance of all advertising, this practice hampered dealers who wanted to sell below the advertised price because they had only three options; they could advertise Serta standard items at the prices contained in the specifications, advertise without using a price, or refrain from any advertising." 296 F.Supp. at 1125.

In the other case principally relied upon by petitioner, *United States* v. *Sealy, Inc.,* 388 U.S. 350 (1967), although the District Court made findings of fact pertaining to advertising, this Court did not decide any issue pertaining to advertising. Rather this Court in *Sealy* held unlawful a horizontal "aggregation of trade restraints" encompassing "flagrant and pervasive price-fixing", territorial allocation, and a horizontal agreement among Sealy licensee-stockholders to fix the retail prices at which all Sealy products could be advertised. 388 U.S. at 354-356.[9]

[9] That the *Sealy* agreement prohibited all discount advertising regardless of who paid for it is apparent from the trial court opinion. *See United States* v. *Sealy, Inc.,* 1964 Trade Cases (CCH) ¶ 71,258, at pp. 80,091-2 (N.D. Ill. 1964). Moreover, the final decree, entered "in compliance with the mandate of the Supreme Court," made no mention of cooperative advertising. *See United States* v. *Sealy, Inc.,* 1967 Trade Cases (CCH) ¶ 72,327, at p. 84,855 (N.D. Ill. 1967).

Bates v. *State Bar of Arizona,* 433 U.S. 350 (1977), and *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748 (1976), also cited by petitioners, were not antitrust cases at all but rather dealt with the application of the First Amendment to state limitations on advertising.[10] In any event, those cases involved complete bans on advertising of any kind (whether or not involving prices), and hence are hardly precedents relevant to cooperative programs designed to subsidize and thus encourage dealer advertising.

Petitioner's suggestion that the decision below is somehow in conflict with *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977), is without justification. The Court of Appeals simply quoted the *Sylvania* decision for the proposition that horizontal cases like *Serta* and *Sealy,* even if relevant, should not be extended to create new *per se* rules in vertical cases unless the decision to do so is "based upon demonstrable economic effect." 433 U.S. at 59. Here, the jury verdict demonstrates the absence of any economic effect (*see* pp. 8-9, *supra*).[11]

Finally, as previously shown (*see* p. 9, *supra*), the legal standards set forth in *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940) and *United States* v. *Trenton Potteries Co.,* 273 U.S. 392 (1927), cited by petitioner, were

[10] The complaint in *Bates* alleged a Sherman Act violation but that issue was never litigated because such a claim was barred by the state action doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943). *See* 433 U.S. at 359-363.

[11] *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958) and *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), which petitioner tacks on to its *Sylvania* argument, do not support petitioner's position. *Northern Pacific* held that a practice is classified *per se* unlawful only after it has been demonstrated to have a "pernicious effect on competition," 356 U.S. at 5, which the jury here found absent. *White Motor* held territorial restrictions *not* illegal *per se.* Neither case had anything to do with advertising.

fully applied by the trial court. The Court of Appeals also correctly applied those authorities in observing that they rendered illegal *per se* "agreements specifically designed to raise, lower, or stabilize prices in a manner which interfered with the free play of market forces" (Pet App. 8a), and in refusing to overturn the jury verdict that such an agreement was not established by the evidence in this case.

The Court of Appeals decision not only correctly applies all relevant Supreme Court precedents, but also is supported by other Court of Appeals decisions. Cooperative advertising programs have been upheld in the Fourth Circuit, *see Nelligan* v. *Ford Motor Co.*, 262 F.2d 556 (4th Cir. 1959), and *Miller Motors* v. *Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958); in the Eighth Circuit, *see Kugler* v. *Aamco Automatic Transmissions, Inc.*, 460 F.2d 1214 (8th Cir. 1972); as well as in an earlier decision of the Fifth Circuit, *see Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). Significantly, petitioner cannot cite a single conflicting Court of Appeals decision.

Similarly, District Court decisions are also consistent with the decision below. *See Sunrise Toyota, Ltd.* v. *Toyota Motor Co.*, 55 F.R.D. 519, 532 (S.D.N.Y. 1972). Indeed, *United Shoppers Exclusive* v. *Broadway-Hale Stores, Inc.*, 1966 Trade Cases (CCH) ¶ 71,727 (N.D. Cal. 1965), holds that even where, unlike the present case, a cooperative advertising program rigorously conditions reimbursement upon advertising suggested list prices, no violation of the Sherman Act has occurred:

> "A distributor might well decide in its own independent judgment that if he is going to pay for advertising, it will state the prices (if any) to be used in the advertising copy. After all, if the dealer wants to advertise at some other price, the dealer can pay for the ad." *Id.* at 82,282.

The *Broadway-Hale* rationale takes on additional force in the automobile industry where, as noted by the Court of Appeals below (Pet. App. 8a), suggested retail prices are not merely lawful, but are actually required by federal law. 15 U.S.C. § 1231 *et seq.* (The "Monroney Act").

In summary, petitioner has cited no authority at any level with which the Court of Appeals decision conflicts.[12] Moreover, petitioner has certainly cited no authority which even arguably suggests that petitioner is entitled to a judgment holding the co-op program *per se* unlawful in the face of a jury verdict necessarily based on a factual finding that the program had neither the purpose nor the effect of raising, lowering, or stabilizing prices. The Court of Appeals decision is correct and fully consistent with prior authorities, and thus presents no issue requiring Supreme Court review.

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[12] Petitioner's inability to cite any authority for its unprecedented legal position is underscored by its reliance on a *vacated* decision *See Mount Vernon Sundat, Inc.* v. *Nissan Motor Corp.*, 1976-1 Trade Cases (CCH) ¶ 60,842 (E.D. Va. 1975), *opinion vacated and action dismissed with prejudice*, 1977-1 Trade Cases ¶ 61,507 (E.D. Va. 1977). Petitioner brushes the court's vacating of its earlier opinion aside with the unsupported claim that this action was motivated solely by a settlement. However, it is more plausible that the highly unusual step of vacating the opinion was motivated by the fact that the trial judge initially mistakenly thought his decision was controlled by a prior consent decree, contrary to the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a). Likewise irrelevant is petitioner's citation of Federal Trade Commission consent orders and complaints. (Pet. at 10)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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